PETIT
FOR WR
CERTIO

TION

RIT OF

ORARI

Supreme Court, U.S.
FILED

No. 981598 APR 5 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SAM REHDER,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner
Sam Rehder

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

596P

QUESTION PRESENTED

1. The complete rejection of any alibi theory-of-defense instructions by the State of Illinois, even in the face of substantial defense alibi evidence, stands in clear conflict with an overwhelming majority of lower federal court and State court decisions. This Court has not spoken to this issue.

The question presented is whether the Illinois blanket rejection of any alibi theory-of-defense instruction violated petitioner's Due Process Clause guarantees as established in the Fifth and Fourteenth Amendments, and his Sixth Amendment right to a jury trial?

PARTIES TO THE PROCEEDING

Sam Rehder is the petitioner. He appears herein through retained counsel, Allan A. Ackerman, 2000 North Clifton Avenue, Chicago, Illinois, 60614, (312) 332-2891.

Respondent is the State of Illinois through Attorney General James Ryan, 100 East Randolph Street, 12th Floor, Chicago, Illinois, 60601, (312) 814-3000.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 1

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition Below 2

B. Statement of the Facts 3

REASONS FOR GRANTING THE PETITION 6

The complete rejection of alibi theory-of-defense instructions by the State of Illinois conflicts with decisions of the lower federal courts and an overwhelming majority of state courts. This Court has not spoken to the issue.

The question presented is whether the Illinois blanket rejection violates petitioner's Fifth Amendment Due Process Clause right to a theory-of-defense instruction and his Sixth Amendment right to a jury trial? 6

A. This Court's theory of defense precedent 6

B. The majority of federal circuits hold that the failure to give an alibi jury instruction is prejudicial error 9

C. The majority of state jurisdictions hold that the failure to give an alibi jury instruction is prejudicial error 12

D. The State of Illinois and alibi jury instructions 16

E. The circuits are divided on the question of whether the failure to provide an alibi defense rises to the level of federal constitutional error 18

CONCLUSION 23

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases	PAGE(S)
Brooks v. Alabama, 380 So.2d 1012 (1980)	12
Brown v. Georgia, 122 Ga.App. 470, 177 S.E.2d 509 (1970)	12
California v. Ratliff, 41 Cal.3d 675, 224 Cal.Rptr. 705, 715 P.2d 665 (1986)	12
Colorado v. Nunez, 841 P.2d 261 (Colo. Sup.Ct., 1992)	12
Commonwealth of Pennsylvania v. Roxberry, 529 Pa. 160, 602 A.2d 826 (Pa. Sup.Ct., 1992)	15
Commonwealth v. Medina and Soto, 404 N.E.2d 1228 (1980)	13
Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995)	19
Duckett v. Nevada, 104 Nev. 6, 752 P.2d 752 (1988)	14, 21
Giesberg v. Texas, 945 S.W.2d 120, Texas Ct.Crim.App., No. 696-97 (1998 WL 670415; 9/30/98); *cert. denied*, 119 S.Ct. 1044 (1999)	15
Goldsby v. United States, 160 U.S. 70, 16 S.Ct. 216 (1895)	6

Holmes v. Mississippi, 481 So.2d 319 (Miss. 1985) 13

Hudson v. Florida, 381 So.2d 344 (1980) 12

Iowa v. Stump, 254 Io. 1181, 119 N.W.2d 210 (Iowa Sup.Ct., 1963) 13

Jennings v. Indiana, 514 N.E.2d 836 (Ind. Sup.Ct., 1987) 13

Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969) 11, 13, 18

Johnson v. Bennett, 393 U.S. 253, 89 S.Ct. 436 (1968) 7

Jones v. Texas, 398 S.W.2d 753 (Tex. 1966) 15

Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883 (1988) 8

Michigan v. McGinnis, 402 Mich. 343, 262 N.W.2d 669 (Mich. Sup.Ct., 1978) 13

Nebraska v. El-Tabech, 225 Neb. 395, 405 N.W.2d 585 (1985) 13

New Jersey v. Garvin, 44 N.J. 268, 208 A.2d 402 (1965) 1

New Jersey v. Searles, 82 N.J. Supr. 210, 197 A.2d 384 (App.Div., 1964) 14

New York v. Jack, 74 N.Y.2d 708, 541 N.E.2d 410 (C.A.N.Y. 1989) 14

North Carolina v. Hunt, 283 N.C. 617,
197 S.E.2d 513 (1973) 14

Ohio v. Bridgeman, 51 Oh.App.2d 105,
366 N.E.2d 1378, 90 P.2d 665 (1986) 14

People v. Pearson, 19 Ill.2d 609,
169 N.E.2d 252 (1960) 16-17

People v. Poe, 48 Ill.2d 506,
272 N.E.2d 28 (1971) 17

People v. Scott, 401 Ill. 80,
81 N.E.2d 426 (1948) 16

Poe v. Tennessee, 212 Tenn. 413,
370 S.W.2d 488 (1963) 15

Robertson v. Maryland, 111 Md.App. 366,
685 A.2d 805 (1996) 13

South Carolina v. Bealin, 201 S.C. 490,
23 S.E.2d 746 (S.C.Sup. Ct. 1943) 15

Stevenson v. United States, 162 U.S. 313,
16 S.Ct. 839 (1896) 7

Stump v. Bennett, 398 F.2d 111
(8th Cir. 1968) 7

Sullivan v. Louisiana, 508 U.S. 275 (1993) 20

Taylor v. Kentucky, 436 U.S. 478,
98 S.Ct. 1930 (1978) 8, 22

Trissell v. Oklahoma, 737 P.2d 1228 (Okl. Cr., 1987) 14

United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976) 9

United States v. Barrasso, 267 F.2d 908 (3rd Cir. 1959) 10

United States v. Booz, 451 F.2d 719 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820, 94 S.Ct. 45 (1973) 22

United States v. Burse, 531 F.2d 1151 (2nd Cir. 1976) 9

United States v. Douglas, 818 F.2d 1317 (7th Cir. 1987) 18

United States v. Gaudin, 515 U.S. 506 (1995) 20, 21

United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982) 10

United States v. Harston, 64 F.3d 491 (9th Cir. 1995) 11

United States v. Hicks, 748 F.2d 854 (4th Cir. 1984) 10, 18, 19

United States v. Kwong, 69 F.3d 663 (2nd Cir. 1995) 9

United States v. Marcus, 166 F.2d 497 (3rd Cir. 1948) 10

United States v. Megna, 450 F.2d 511 (5th Cir. 1971) 10

United States v. McCall, 85 F.3d 1193 (6th Cir. 1996) 10

United States v. Simon, 995 F.2d 1236 (3rd Cir. 1993) 10, 18-19

United States v. Webster, 769 F.2d 487 (8th Cir. 1985) 11

United States v. Zuniga, 6 F.3d 569 (9th Cir. 1993) 11, 21

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) 7

Washington v. Pam, 1 Wash. App. 723, 463 P.2d 200 (1970) 15

Williams v. Florida, 395 So.2d 1236 (Fla. 1981) 12

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970) 7

Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991) 19

United States Constitution

United States Constitution:

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

Fourteenth Amendment ..... i, 2, 17, 18

Federal Statutes

28 U.S.C. Section 1257(a) 1

State Statutes

Ill. 720 ILCS 5/3-2(b) 21

Other Authorities

Wright, *Federal Practice and Procedure*, 2 ed. at § 491 (West. 1982) 9

Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions*, 4th ed. at § 19.07 (West. 1992) 11

1968 and 1992 Illinois Pattern Jury Committee Comments ..... 17; App. 23

PETITION FOR WRIT OF CERTIORARI

Sam Rehder, petitioner, by his attorney, Allan A. Ackerman, requests that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court, First District, entered on June 17, 1998 in *Illinois v. Sam Rehder.*

OPINION BELOW

The unpublished opinion of the Illinois Appellate Court, First District, is unreported and is reproduced at App. 1-18, *infra*. Petitioner's timely petition for Illinois Supreme Court review was denied on February 3, 1999, App. 19, *infra*.

JURISDICTION

The Appellate Court of Illinois, First District, affirmed petitioner's conviction and sentence on June 17, 1998. The Illinois Supreme Court declined review on February 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment to the U.S. Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the U.S. Constitution, in part, states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case squarely raises the important and unresolved issue of whether the State of Illinois, without transgressing the Fifth, Sixth and Fourteenth Amendments, can deprive a criminal defendant of an alibi theory-of-defense instruction as a matter of Illinois policy. Several federal circuits and most state jurisdictions hold that where a criminal defendant presents some alibi evidence, the trial court *must* provide the deliberating jury with an alibi instruction.

A. *Course of Proceedings and Disposition Below*

On June 28, 1989, petitioner was indicted for first-degree murder by the Cook County, Illinois, grand jury

(C-13-15). Petitioner was granted bail pending trial and was represented by retained counsel. His jury trial commenced on September 23, 1991, and culminated in a guilty verdict on September 27, 1991. Petitioner's bail was immediately revoked and he remains in custody.

On November 21, 1991, petitioner, age 21, was sentenced to a forty-five year custodial sentence. Petitioner's conviction and sentence was affirmed on direct appeal to the Illinois Appellate Court, First District. The Illinois Supreme Court declined review. This petition is from the Illinois Appellate Court's affirmance on petitioner's direct appeal.

B. *Statement of the Facts*

The facts undergirding this certiorari petition are, in large part, undisputed. On April 15, 1989, at approximately 10:15 p.m., at the intersection of Lexington and Kostner in Chicago, Anthony Logan was the victim of a shooting. Trial facts disclosed that there were several Afro-American members of the Gangster Disciples street gang gathered at Lexington and Kostner (Tr. 380, 464-473). Because of ongoing street repairs, the traffic flow was frequently interrupted. At approximately 10:15 p.m., two cars were stopped at that intersection. One of the cars was allegedly driven by petitioner (Tr. 80, 385-87). Individuals in the two temporarily halted cars began "throwing up gang signs" which were recognized as being members of the "Latin Kings" (Tr. 385-87). According to prosecution witnesses, petitioner exited one of the traffic-bound cars and exchanged words with the Lexington-Kostner throng. The corner gang members threw bottles at the petitioner, who then

retrieved a pistol and shot into the crowd, killing Anthony Logan (Tr. 390-91, 669-676).

On May 23, 1989, petitioner was arrested on the west side of Chicago (Tr. 680-83). Cross-racial line-ups ensued and petitioner was identified by two of the Lexington-Kostner group as the shooter (Tr. 394, 479-80).

Petitioner's defense was *alibi*. Testimony and exhibits established that on April 15, 1989 at 8:00 p.m. and throughout the balance of that evening, he was home with his mother, brother, sister and uncle preparing federal income tax returns: testimony of his mother, Annette Rehder (Tr. 863, 865-71); testimony of his eldest sister, Denise Ryan (Tr. 909-14) (when she left the family abode to mail the tax returns at approximately 11:00 p.m. petitioner was at home with the family); testimony of his eldest brother, Richard Rehder (petitioner was at home from 8 p.m. until when Richard departed the family abode around midnight on April 15, Tr. 940-43). In addition, copies of the tax returns prepared on that date were admitted as Defense Exhibit one-three (Tr. 989).

After the close of evidence, the trial court conducted a jury instruction conference. Petitioner's trial counsel submitted alibi theory-of-defense instructions (Tr. 1016-19). One of the rejected alibi instructions was taken directly from an approved Seventh Circuit Alibi Pattern Instruction, which reads:

> Evidence has been introduced that the defendant was not present at the time and place where the crime charged in the indictment is alleged to have been committed. The government has the burden of establishing beyond a

> reasonable doubt the defendant's presence at that time and place.

Seventh Circuit Pattern Instruction, § 4.03 (1980) (Org. Rec. C-136).

The trial court, rejecting petitioner's *alibi* theory of defense instructions, noted:

> ". . . if there's some new law to be made, maybe this is a case you can make it in" (Tr. 1019).

The trial jury received no instruction regarding petitioner's sole theory of defense: *alibi*. On September 27, 1991, after summations and instructions, the jury returned a first-degree murder guilty verdict (Tr. 1075). On November 21, 1991, petitioner, a first-offender, was sentenced to forty-five years in custody (Tr. 1127).

3. Petitioner's original appellate counsel failed to file an opening brief and the Illinois Appellate Court, First District, dismissed petitioner's appeal for want of prosecution on January 25, 1993. With the benefit of new appellate counsel, his appeal was reinstated and on June 17, 1998, after plenary briefing and oral argument, petitioner's conviction was affirmed. App. 1-18, *infra*. The appellate court rejected petitioner's alibi instruction plaints based upon its assumption that because the Illinois Committee on Illinois Pattern Instructions "recommended" against the giving of an alibi instruction, the trial court was correct in rejecting petitioner's alibi theory of defense instruction. App. 9-10, *infra*.

Petitioner's timely request for Illinois Supreme Court review, which incorporated federal constitutional authorities and argument in support of an alibi instruction, was denied on February 3, 1999. App. 19, *infra*.

REASONS FOR GRANTING THE PETITION

The complete rejection of alibi theory-of-defense instructions by the State of Illinois conflicts with decisions of the lower federal courts and an overwhelming majority of state courts. The Illinois blanket rejection unquestionably violates petitioner's Fifth Amendment Due Process Clause right to a theory of defense instruction and his Sixth Amendment right to a jury trial. Since the Court has not spoken directly to the issue, this petition presents the appropriate vehicle for definitively resolving whether federal constitutional error flows from the total absence of an alibi theory-of-defense instruction, where alibi represented the defendant's sole defense, and the trial evidence clearly warranted such an instruction.

A. THIS COURT'S THEORY OF DEFENSE PRECEDENT.

Over five-score years ago, the Court briefly considered alibi instructions in a homicide prosecution. In *Goldsby v. United States*, 160 U.S. 70, 77, 16 S.Ct. 216, 219 (1895), the Court visited the failure to provide *Goldsby's* jury with an alibi instruction. While affirming *Goldsby's* conviction, Justice White explained:

> If the accused wished specific charges to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and therefore the assignments of error are without merit.

160 U.S. at 77.

Petitioner's research disclosed a second Court decision arguably impacting on alibi instructions. In *Johnson v. Bennett*, 393 U.S. 253, 89 S.Ct. 436 (1968), the Court vacated the denial of habeas corpus relief and remanded for Eighth Circuit resolution the question of whether an Iowa alibi instruction impermissibly placed the burden of proof on the defendant. On remand, the Eighth Circuit, sitting *en banc*, held that an alibi instruction which placed the burden of proof on the defendant violated the Due Process Clause of the Fourteenth Amendment, *Stump v. Bennett*, 398 F.2d 111, 113-17 (8th Cir. 1968) (*en banc*).[1]

It has long been held that a defendant in a criminal case has the right to have his theory of the case submitted to the jury. For example, in *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 842 (1896), the Court reversed *Stevenson's* murder conviction because the trial court declined to submit his theory of defense (manslaughter) for petit jury consideration. The Court noted that the jury might reject the defense, ". . . But why should the other [manslaughter] issue be taken from the jury, and they not be permitted to pass upon it as upon a question of fact?" *Id.*

---

[1] In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970) and *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), the Court reviewed the constitutionality *vel non* of reciprocal notice-of-alibi discovery rules. In *Williams*, the Florida notice-of-alibi rules were valid based on the availability of extensive reciprocal discovery. In *Wardius*, the Oregon rules were held invalid because they were one-sided in favor of the prosecution. Neither case considered the blanket prohibition against alibi jury instructions.

Chief Justice Rehnquist authored the reversing opinion in *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883 (1988). In *Mathews*, the trial court refused to instruct the jury regarding entrapment because the defendant eschewed admitting all the elements of the charged drug offenses, 485 U.S. at 62-63. While explaining that inconsistent defenses were authorized in criminal cases, the Chief Justice noted:

> As a general proposition a defendant is entitled to an instruction as to any *recognized defense* for which there exists evidence sufficient for a reasonable jury to find in his favor.

485 U.S. at 63 (emphasis added, supporting authorities omitted).

The respondent may argue that the absence of an alibi instruction did not preclude petitioner's trial counsel from arguing his alibi. Surely, that is true. But in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978), the Court reversed a criminal conviction, finding that the failure to give a specific presumption of innocence instruction violated *Taylor's* right to a fair trial. Justice Powell explained:

> The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. *But arguments of counsel cannot substitute for instructions by the court.*

436 U.S. at 488-89 (emphasis added).

Petitioner asserts that a blending of the Court's cases (*Goldsby, Stevenson, Mathews* and *Taylor*), discloses a clear bias *in favor* of providing the criminally accused

with the benefit of a theory-of-defense jury instruction—including alibi.[2]

B. THE MAJORITY OF FEDERAL CIRCUITS HOLD THAT THE FAILURE TO GIVE AN ALIBI JURY INSTRUCTION IS PREJUDICIAL ERROR.

The federal circuits consistently hold that the failure to provide an alibi instruction, when supported by even inconsistent evidence, rises to the level of prejudicial error:

1. *D.C. Circuit*: *United States v. Alston*, 551 F.2d 315, 318-20 (D.C. Cir. 1976) (reversing armed robbery where trial court failed to place burden of proof on the government on all issues, including alibi within the fabric of the jury instruction in that case).

2. *Second Circuit*: *United States v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976) (reversing conspiracy to rob a federally insured bank while noting it is ". . . well established that, under proper circumstances, the jury must be given an alibi instruction when the defendant so requests."); *United States v. Kwong*, 69 F.3d 663, 667 (2nd Cir. 1995) ([but] the trial court may refuse to give an alibi instruction however, where the alleged alibi evidence is not inconsistent with guilt).

---

[2] See Wright, *Federal Practice and Procedure*, 2 ed. at § 491 at pp. 757-58 (West. 1982) ("On request of the defendant, the jury should be instructed that the government's burden of proof covers the defense of alibi, as well as other phases of the case. It should be made clear that this burden remains on the government even though the jury disbelieves the alibi witnesses. It is not error to fail to give an alibi instruction, however, in the absence of a request for the instruction").

3. *Third Circuit*: *United States v. Marcus*, 166 F.2d 497, 503-04 (3rd Cir. 1948) (reversing federal bribery conviction, explaining ". . . if the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case."); *United States v. Barrasso*, 267 F.2d 908, 910 (3rd Cir. 1959) (same); *United States v. Simon*, 995 F.2d 1236, 1244 (3rd Cir. 1993) (". . . in the special case of an alibi defense the jury charge on alibi must include a specific instruction setting forth the government's burden of proof").

4. *Fourth Circuit*: *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984) (reversing for failure to instruct on alibi, explaining that ". . . Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury * * * Failing to give the jury an alibi instruction was thus an error of constitutional magnitude . . . .").

5. *Fifth Circuit*: *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971) (failure to give an alibi instruction compelled conviction vacation in federal theft prosecution).

6. *Sixth Circuit*: *United States v. Hamilton*, 684 F.2d 380, 385 (6th Cir. 1982) (reversing, in part, counterfeiting convictions, explaining ". . . We find that the failure to give the instruction was plain error affecting substantial rights of the defendant. The proposed alibi instruction was a proper statement of the law and Hamilton clearly presented sufficient evidence to warrant the giving of such an instruction."); *United States*

v. McCall, 85 F.3d 1193, 1195-96 (6th Cir. 1996) (affirming where defendant never requested an alibi jury instruction (collecting authorities)).

7. *Eighth Circuit*: *Johnson v. Bennett*, 414 F.2d 50, 52-57 (8th Cir. 1969) (*en banc*) (opinion by Circuit Judge, later United States Supreme Court Justice Blackmun) (holding that defendant was entitled to an alibi instruction and shifting the burden of proving an alibi defense violated the Due Process Clause of the Fifth and Fourteenth Amendments); *United States v. Webster*, 769 F.2d 487, 490 (8th Cir. 1985) (finding that defendant was entitled to alibi theory-of-defense instruction, but failure to charge on alibi was harmless error under the circumstances of the case).

8. *Ninth Circuit*: *United States v. Zuniga*, 6 F.3d 569, 570-71 (9th Cir. 1993) (reversing bank robbery conviction where district court committed reversible error by refusing to instruct the jury on the defendant's alibi defense, noting ". . . To avoid this possibility, "[w]here alibi is the defense[,] a suitable *alibi* instruction *must be given when requested.*" *Id.* at 570) (emphasis in original); *United States v. Harston*, 64 F.3d 491, 493 (9th Cir. 1995) (reversing assault and firearm conviction where district court refused to instruct on alibi).[3]

---

[3] Petitioner has reproduced in App. 20-22, *infra*, approved alibi-pattern jury instructions from the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh federal circuits. See also, Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions*, 4th ed. at § 19.07 (West. 1992), reviewing federal circuit authorities, *viz.*, alibi jury instructions.

As reproduced, *ante*, a sampling of federal circuit precedent clearly reveals that the accused may have a constitutional right to his or her theory-of-defense [jury] instruction.

C. THE MAJORITY OF STATE JURISDICTIONS HOLD THAT THE FAILURE TO GIVE AN ALIBI JURY INSTRUCTION IS PREJUDICIAL ERROR.

1. Alabama: *Brooks v. Alabama*, 380 So.2d 1012, 1014 (1980) (reversing burglary conviction for failure to give alibi instruction).

2. California: *California v. Ratliff*, 41 Cal.3d 675, 224 Cal.Rptr. 705, 715, 715 P.2d 665, 676 (1986) (same).

3. Colorado: *Colorado v. Nunez*, 841 P.2d 261 (Colo. Sup.Ct., 1992) (*en banc*) (trial court's failure to cooperate with the defendant to either correct tendered alibi instruction or to incorporate substance of alibi instruction into court's instruction was prejudicial error. *Id.* at 266-67 and nn. 11-13).

4. Florida: *Hudson v. Florida*, 381 So.2d 344, 345-46 (1980) (reversing robbery conviction where trial court declined to give defendant's requested alibi instruction); *Williams v. Florida*, 395 So.2d 1236, 1238 (Fla. 1981) (same).

5. Georgia: *Brown v. Georgia*, 122 Ga.App. 470, 177 S.E.2d 509 (1970) (it is error, even in the absence of request, to fail to charge on the law of alibi where this is the defendant's sole defense and was supported not only by his statement, but by the testimony of witnesses).

6. Indiana: *Jennings v. Indiana*, 514 N.E.2d 836, 837 (Ind. Sup.Ct., 1987) (reversing burglary and theft conviction based on flawed alibi instruction).

7. Iowa: *Iowa v. Stump*, 254 Io. 1181, 119 N.W.2d 210, 217 (Iowa Sup.Ct., 1963) (divided court affirmed second-degree murder conviction where alibi instruction placed burden of proof on defendant); vacated in *Johnson v. Bennett*, 414 F.2d 50 (8th Cir. 1969) (*en banc*) (Blackmun, J.).

8. Maryland: *Robertson v. Maryland*, 111 Md.App. 366, 685 A.2d 805, 812-13 (1996) (reversing first-degree murder where trial court failed to give specific alibi instruction).

9. Massachusetts: *Commonwealth v. Medina and Soto*, 404 N.E.2d 1228, 1236-37 (1980) (reversing as to Soto where trial court declined to charge the jury on Soto's alibi defense, but noting that in Massachusetts an alibi charge is discretionary with the trial court), *Commonwealth v. McLeod*, 367 Mass. 500, 502, n. 1, 316 N.E.2d 905, 906, n. 1 (1975) (reproducing model alibi instruction).

10. Michigan: *Michigan v. McGinnis*, 402 Mich. 343, 262 N.W.2d 669, 671 (Mich. Sup.Ct., 1978) (reversing rape and larceny for failure to give alibi-theory of defense instruction where evidence presented that defendant was elsewhere when the crime occurred).

11. Mississippi: *Holmes v. Mississippi*, 481 So.2d 319, 321 (Miss. 1985) (reversing burglary conviction for the failure to give alibi-theory of defense instruction).

12. Nebraska: *Nebraska v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1985) (rejecting relief predicated on trial court's declination to charge on alibi defenses).

13. Nevada: *Duckett v. Nevada*, 104 Nev. 6, 752 P.2d 752, 754-55 and n. 2 (1988) (we agree with the majority view and conclude that, when requested and supported, alibi instructions should be given, citing multiple state and federal authorities).

14. New York: *New York v. Jack*, 74 N.Y.2d 708, 541 N.E.2d 410-411 (C.A.N.Y. 1989) (affirming intermediate appellate conviction vacation where trial court refused counsel's request for alibi jury charge).

15. New Jersey: *New Jersey v. Searles*, 82 N.J. Supr. 210, 197 A.2d 384 (App.Div., 1964) (plain error not to charge the jury on alibi defense), but see *New Jersey v. Garvin*, 44 N.J. 268, 208 A.2d 402, 405-06 (1965) (questioning need for specific alibi instructions).

16. North Carolina: *North Carolina v. Hunt*, 283 N.C. 617, 197 S.E.2d 513, 515 (1973) (prejudicial error not to instruct on alibi where evidence warranted alibi instruction).

17. Ohio: *Ohio v. Bridgeman*, 51 Oh.App.2d 105, 366 N.E.2d 1378, 1389-90 (1977) (reversing aggravated murder ". . . We join those jurisdictions which recognize the duty of the court to instruct the jury upon the subject of alibi, with or without the request of counsel, where alibi is the defendant's sole defense and is supported by his testimony as well as by the testimony of other witnesses") (citing decisions from Tennessee, South Carolina, New Jersey, Georgia, Texas, and Kansas).

18. Oklahoma: *Trissell v. Oklahoma*, 737 P.2d 1228, 1229 (Okl. Cr., 1987) (. . . to entitle the defense to an alibi instruction the accused's proof must show that he could not have been at the place of the offense at the

time shown by the prosecution); *Goodwin v. State*, 654 P.2d 643, 655 (Okl.Crim.App. 1982) (same).

19. Pennsylvania: *Commonwealth of Pennsylvania v. Roxberry*, 529 Pa. 160, 602 A.2d 826, 827-28 (Pa. Sup.Ct., 1992) (affirming grant of new trial based on ineffective assistance of counsel in kidnapping and rape prosecution where defense counsel failed to tender alibi instruction to which defendant would have been entitled under Pennsylvania law); *Commonwealth v. Brunner*, 341 Pa. Super., 491 A.2d 150, 152-53 (1985) (same).

20. South Carolina: *South Carolina v. Bealin*, 201 S.C. 490, 23 S.E.2d 746, 756 (S.C. Sup.Ct. 1943) (murder conviction reversed where the trial court failed, *inter alia*, to instruct the jury on the law of alibi); *South Carolina v. Robbins*, 275 S.C. 373, 271 S.E.2d 319, 320 (1980) (same).

21. Tennessee: *Poe v. Tennessee*, 212 Tenn. 413, 420, 370 S.W.2d 488, 489-90 (1963) (reversible error where trial court failed to give alibi instruction, notwithstanding defense counsel's failure to request specific alibi charge); *Christian v. Tennessee*, 555 S.W.2d 863, 864 (Tenn. 1977) (same).

22. Texas: *Jones v. Texas*, 398 S.W.2d 753, 754 (Tex. 1966) (defendant entitled to specific alibi instruction); *contra Giesberg v. Texas*, 945 S.W.2d 120, Texas Ct. Crim.App., No. 696-97 (1998 WL 670415; 9/30/98) (divided court held defendant not entitled to special instruction on alibi defense); *cert. denied*, 119 S.Ct. 1044 (1999).

23. Washington: *Washington v. Pam*, 1 Wash. App. 723, 463 P.2d 200, 203 (1970) (alibi instruction not

fatally flawed where instruction included language that the defendant need not prove alibi beyond reasonable doubt, but clearly noting that defendant entitled to specific alibi instruction).

In the ensemble, twenty-one of twenty-three randomly selected jurisdictions hold that the trial court commits prejudicial error in failing to submit an alibi jury-instruction where warranted by [the] trial evidence.

D. THE STATE OF ILLINOIS AND ALIBI JURY INSTRUCTIONS.

In 1948, the Illinois Supreme Court held that the trial court committed reversible error in failing to instruct on alibi. In *People v. Scott*, 401 Ill. 80, 81 N.E.2d 426, 429-30 (1948), the court considered whether to vacate an indecent liberties conviction where the trial court refused defendant's alibi instruction. Chief Justice Fulton authored the unanimous reversing opinion, noting:

> We think under the proof, the refusal to give an instruction on the important issue of alibi might have been prejudicial to the defendant. The evidence offered to establish the alibi covered the entire period when the crime was alleged to have been perpetrated. We are not called upon to judge the weight of the evidence upon this question, as very slight evidence upon a given theory of a case will justify the giving of an instruction.

81 N.E.2d at 429 (supporting authorities and quotation marks omitted)

The Illinois Supreme Court again reviewed alibi instructions in *People v. Pearson*, 19 Ill.2d 609, 169 N.E.

2d 252, 255-56 (1960). While affirming *Pearson*'s rape conviction, the court nonetheless approved the alibi instruction given by the trial court. *Id.* at 254-55 (reproducing alibi instructions). However, in 1968, an Illinois committee on pattern jury instructions "recommended" that the trial courts refrain from giving alibi jury instructions. After 1968, Illinois trial courts declined to charge on an alibi defense, irrespective of the evidence. Post-I.P.I., the Illinois Supreme Court affirmed burglary and theft convictions in *People v. Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971). While affirming, the Court noted that *Poe's* alibi instructions (non-I.P.I.) were not "impartial and free from argument," 272 N.E. 2d at 31. Justice Ryan went on to explain that the I.P.I. committee "*recommends*" that no instruction be given because alibi is not an affirmative defense, 272 N.E.2d at 31-32. The "recommendation" has been perpetuated in the 1992 I.P.I. § 24-25.05 (3rd ed., 1992); (The Committee *recommends* that no instruction be given on this subject; pg. 314).[4]

There is an immense distinction between making a "recommendation" and a rule of law. To recommend is to advise, encourage, urge, or suggest. Petitioner contends that his Fifth, Sixth and Fourteenth Amendment protections ought not be emasculated by virtue of a committee "recommendation," *viz.*, an essential alibi jury instruction.

---

[4] The committee alibi instruction "recommendations" appearing in the 1968 and 1992 Illinois Pattern Jury publications are reproduced at App. 23.

E. THE CIRCUITS ARE DIVIDED ON THE QUESTION OF WHETHER THE FAILURE TO PROVIDE AN ALIBI DEFENSE RISES TO THE LEVEL OF FEDERAL CONSTITUTIONAL ERROR.

The Fourth Circuit, in *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984), held that the failure to provide an alibi instruction rose to the level of federal constitutional error in that the defendant had a ". . . Sixth Amendment and due process right to have that [alibi] issue submitted to the jury" and the failure to do so was "[thus] an error of constitutional magnitude."

Justice Blackmun, while a circuit judge, wrote the *en banc* decision in *Johnson v. Bennett*, 414 F.2d 50, 52-57 (8th Cir. 1969), explaining that within the fabric of an alibi instruction, shifting the burden of proving the alibi defense to the defendant was violative of the Due Process Clause under the Fifth and Fourteenth Amendments.

The Seventh Circuit, in *United States v. Douglas*, 818 F.2d 1317, 1319 (7th Cir. 1987), held that the Fifth Amendment applied to a situation where the district court refused to provide the jury with the defendant's theory of the case ("We conclude that the defendants' *Fifth Amendment* right to have the jury consider their theory of defense was violated in this case, because even though the record shows that the defendants' theory of defense at trial was that they were mere purchasers from one conspiracy, the trial court, relying on the pattern jury instructions, did not instruct the jury on this theory").

In *United States v. Simon*, 995 F.2d 1236, 1244-45 (3rd Cir. 1993), the court noted that the Third Circuit

holds that the failure to provide an alibi instruction is *non-constitutional error* . . . [but] ". . . we recognize that the improper alibi instruction also may be construed as "constitutional" error, to the extent that it suggests that the accused bears a burden of persuasion on the alibi defense" (citing, *inter alia*, *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 1892 (1991).[5]

In *Duckett v. Godinez*, 67 F.3d 734, 744-45 (9th Cir. 1995), the court affirmed the denial of § 2254 relief where the primary § 2254 issue related to the trial court's refusal to charge the jury on *Duckett's* alibi defense. The court noted that the Second, Third, Fourth, Fifth and Ninth Circuits hold in cases arising on direct appeal from a federal district court that it is always reversible error not to instruct on an alibi defense where specifically requested and there is some evidence in the record supporting the instruction. *Id.* at 745 (collecting cases). The affirming panel further noted that the Second and Fifth Circuits have not indicated whether the failure to instruct on an alibi defense is constitutional error and only the Fourth Circuit has directly implicated the failure to instruct as "an error of constitutional magnitude," citing *United States v. Hicks*, 748 F.2d at 858 (4th Cir. 1984).

---

[5] It seems constitutionally ironic to suggest that the failure to give an alibi instruction is non-constitutional error, but providing a burden-shifting flawed alibi instruction *may* rise to the level of constitutional error.

In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995), the Court found constitutional error in the trial court's failure to submit the question of materiality to the jury within the context of a prosecution under 18 U.S.C. § 1001. Justice Scalia's opinion explained:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993).

515 U.S. at 509-10, n. 1 omitted.

Chief Justice Rehnquist wrote a concurring opinion which noted:

> Federal and state legislators may reallocate burdens of proof by labeling elements as affirmative defenses . . . .

515 U.S. at 525 (supporting citations omitted; Justices O'Connor and Breyer joined in the concurring opinion).

Under Illinois law, an "affirmative defense" means that unless the State's evidence raises the issue involving the alleged offense, the defendant, to raise the issue, must present some evidence thereon. Once the issue is raised, then the State must sustain the burden of proving the defendant guilty beyond a reasonable

doubt as to that issue together with all the other elements of the offense.[6]

The State of Illinois has clearly marked "alibi" as an affirmative defense—that is, unless the defendant presents "some evidence thereon" the issue is not raised for jury consideration. But the petitioner presented substantial alibi evidence, and was deprived of a crucial alibi jury instruction, not because the Illinois legislature "reallocated [a] burden of proof by labeling elements as affirmative defenses" (per Chief Justice Rehnquist's *Gaudin* concurrence)—but, rather, because [the] Committee on Illinois Pattern Jury Instructions in 1968 "recommended" that no alibi instruction be afforded a criminal defendant in the State of Illinois (App. 23, *infra*).

In *Duckett v. Godinez*, *supra*, the court explained why a specific alibi instruction is crucial:

> We have warned that instructions on the presumption of innocence, the government's burden of proving every element of the crime beyond a reasonable doubt, and the identification of the defendant as the perpetrator of the charged crime are not adequate substitutes for a specific alibi instruction * * * in *Zuniga*, we said that [a]n alibi instruction is critical because, without it, there is a danger that the jury may interpret the defendant's failure to prove his alibi as proof of guilt.

---

[6] The sole exception relates to [an] insanity defense which is inapposite to this petition, cf., 720 ILCS 5/3-2(b) (App. 24).

67 F.3d 743-44 (9th Cir. 1995) (internal authorities and quotation marks omitted).[7]

Petitioner's entire case rested on *identification versus alibi*. The prosecution presented no weapon, no fingerprint evidence, no accomplice testimony and no post-arrest statement or confession from the petitioner. Not a single prosecution witness gave a contemporary description of the offender to the police on April 15, 1989. Petitioner's specific request for a concise alibi instruction was refused.[8] The Court has ruled that arguments of counsel are no substitute for jury instructions.[9]

---

[7] In *United States v. Booz*, 451 F.2d 719, 723 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820, 94 S.Ct. 45 (1973), the Court similarly explained the need for a specific alibi instruction ("We require such a specific instruction regarding an alibi defense because "the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence.").

[8] Evidence has been introduced that the defendant was not present at the time and place where the crime charged in the indictment is alleged to have been committed. The government has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place.

Seventh Circuit Pattern Instruction, § 4.03 (1980) (Org.Rec. C-136).

[9] *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936 (1978) (But arguments of counsel cannot substitute for instructions by the court).

CONCLUSION

This case squarely presents the issue of whether the failure to instruct the jury regarding an alibi defense can rise to the level of constitutional error where, as here, there was persuasive alibi evidence comprising petitioner's singular defense. The Fourth Circuit holds that the failure to provide a specific alibi jury instruction rises to the level of Fifth and Sixth Amendment error. The Third Circuit has held otherwise, and the Second and Fifth Circuits have not taken a [constitutional] position. This Court has not spoken to the issue presented.

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First District, in this cause.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner
Sam Rehder